IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL NO. 45 OF 2013

BETWEEN: **BEN SUA**
Appellant

AND: **JOLE ANTAS**
First Respondent

AND: **SANTO MALO JOINT AREA LAND TRIBUNAL**
Second Respondent

AND: **SANTO MALO ISLAND LAND TRIBUNAL**
Third Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Mary Sey
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop

Counsel: James Tari for the Appellant
George Boar for the First Respondent
Frederick Gilu for the Second and Third Respondents

Date of Hearing: Tuesday 1 April, 2014

Date of Judgment: Friday 4 April, 2014

JUDGMENT

Introduction

1. Mr Sua and Mr Antas are neighbouring custom land owners in South Santo. Mr Sua's family owns land known as Naone Vuso; Mr Antas' family owns land known as Jingonaru.

2. On 2 June 1998 the Supernatavuitano Island Council of Chiefs declared that these two areas of land were owned by those parties. After the Customary Land Tribunal Act [Cap. 271] came into force in 2001, the second respondent, the Santo/Malo Joint Area Land Tribunal, endorsed the decision of the Island Council of Chiefs. In its decision of 9 September 2008 the Jingonaru Land boundaries were demarcated as: *"Poundry wetem Ben Sua long East. Poundry mark hemi finis blong Cattle Project long Easten saed. Long Westen saed long Rowa Riva poundry wetem Salathiel."*

3. There was no appeal by Mr Sua against that decision of the second respondent. Despite that, on 13 May 2009, the chairman of the second respondent, Chief James Tangis issued a public notice calling for interested persons to lodge their claims pertaining to certain custom land, including the Naone Vuso Land. On 18 August 2009 Mr Benuel Tabi of the Land's Department in Santo advised Chief Tangis that Jingonaru land ownership had been finalized and because no one had appealed the decision, that land could not be the subject of a further determination by any other land tribunal.

4. Notwithstanding this, in a decision dated 3 December 2009 the second respondent, while confirming Mr Sua and his family were the custom land owners of the Naone Vuso Land, extended its boundary to include Jingonaru Land, going beyond the Cattle Project fence all the way to the river Vunue. Mr Antas was not involved in the hearing which led to the decision of 3 December 2009 because Jingonaru Land was not one of the areas of land mentioned in the public notice.

5. On 23 April 2010 the third respondent, the Santo/Malo Island Land Tribunal, also extended Mr Sua's land boundaries of the Naone Vuso Land to include Mr Antas' Jingonaru Land.

The Claim and Submissions in the Supreme Court

6. The Supreme Court granted leave to Mr Antas to file his claim for judicial review of these two decisions beyond the 6-month period in rule 17.5 (1) of the Civil Procedure Rules during which judicial review claims may be launched. In the latest version of the claim, filed on 12 September 2012, Mr Antas sought review of the decisions of 3 December 2009 and 23 April 2010 and orders quashing them together with a declaration that Mr Antas is the declared custom owner of Jingonaru Land in South Santo as determined and declared by the Vaturani Custom Land Tribunal (Supernatavuitano Island Council of Chiefs) on 2 June 1998 and as confirmed by the Santo/Malo Joint Area Land Tribunal on 9 September 2008.

7. The basis for the application for Judicial Review was that neither of the second or third respondents was lawfully able to re-determine the matters which had been determined by the second respondent in its decision of 9 September 2008, there having been no appeal. In short, it was claimed that the matter had become res judicata and that both tribunals were estopped from further considering the subject of the 2008 decision. Mr Antas further submitted that the 2009 and 2010 decisions amounted to a collateral attack on the 2008 decision.

8. In the Supreme Court Mr Sua, despite an order that he do so, did not file a defence or written submissions. The only evidence he filed was a short sworn statement by Sale Daniel, but there was no supporting documentation and Justice Saksak found the statement did not assist Mr Sua.

9. On behalf of the respondent tribunals, the Attorney-General did file written submissions which, while abiding the decision of the Court, noted that there had been no appeal against the 9 September 2008 decision and that the Customary Land Tribunal Act does not permit a rehearing of a dispute in relation to the same customary land. It only provides for an appeal to a higher level customary land tribunal in the event that a party to a dispute does not accept the decision of the initial tribunal. The Attorney-General submitted that what the second respondent had done was to purport to rehear the dispute as to the boundaries of the Jingonaru Land.

10. As to the third respondent's decision dated 23 April 2010, the Attorney-General noted that it could not hear a dispute in relation to Jingonaru Land, unless it was by way of appeal, which was not the case here.

The Supreme Court Judgment

11. Justice Saksak noted that the facts were not in dispute and had no hesitation in accepting the primary submission advanced by Mr Boar (supported as it was by the Attorney-General) that both tribunals had no power to do what they had done. His Lordship declared the decisions of 3 December 2009 and 23 April 2010 null and void and of no legal effect thereby quashing them to the extent they were in conflict with the Joint Village Lands Tribunal decision dated 9 September 2008. The latter was upheld as final.

Mr Sua's Appeal

12. Mr Tari, who was not counsel for Mr Sua in the Supreme Court, lodged a notice of appeal containing six grounds but these have been refined to three issues in his written submissions in support of the appeal dated 14 March 2014.

13. Mr Tari submits that the Supreme Court had no power to cancel the decisions of the Area Land Tribunal and the Island Land Tribunal under s. 39 (1) (a) of the Customary Land's Tribunal Act: if it was going to exercise its powers under that paragraph then it had to cancel all decisions at all levels. He submits there is no power in s. 39 (1) (a) to cancel the two appellate decisions yet uphold the decision at the village level. He further submits that in making the decision that it did the Supreme Court took away the rights of appeal which are accorded to Mr Sua in parts 3, 4 and 5 of the Act.

14. In the alternative, Mr Tari submits that if the Court of Appeal is of the view that it is lawful to cancel some of the decisions only , then there is a mandatory requirement under s. 39 (1) (b) to have the dispute determined or re-determined by a differently constituted land tribunal. In this case he submits that in failing to direct accordingly Justice Saksak did not follow the mandatory process under s. 39 (1).

15. The second submission advanced by Mr Tari is that the original decision in respect of the Jingonaru land was not given in accordance with the processes and procedures under the Customary Land Tribunal Act because the decision of the Supernatavuitano Island Council of Chiefs was simply endorsed by the Village Land Tribunal in 2008 without giving notice to potential claimants to come to a hearing. There was indeed no hearing he says. We note though that there was neither sworn evidence before the Supreme Court nor is there any before this Court as to these assertions.

16. Mr Tari goes on to say that the two decisions made on 9 September 2008 in respect of the Naone Vuso and Jingonaru land were both given on 9 September 2008 by the same chiefs sitting on the Village Land Tribunal. He submits the only reason the decision in respect of the Jingonaru land was given was because of a disagreement between the chiefs and the parties involved in the Naone Vuso decision given earlier in the day. Again, these assertions are not the subject of any sworn statement.

17. Finally Mr Tari advances the submission that Jingonaru was not a name known in South Santo in relation to boundaries. He points to a declaration of 14 December 1982 by the then Minister of Lands in which there is no mention of an area by that name. Mr Tari has filed a sworn statement of Joel Daniel in support of the appeal, sworn on 20 March 2014 which annexes that declaration and a letter of 12 March 2008 from the Senior Customary Lands Officer which in listing the relevant customary land omits any reference to Jingonaru. As to this point, we agree with Mr Boar that the evidence sought to be adduced does not meet the usual test of freshness. There appears to be no reason why this information, if thought to be relevant by Mr Sua, could not have been put before the Supreme Court.

18. Overall, Mr Tari submits that the Court of Appeal should cancel all of the decisions relating to the Naone Vuso and Jingonaru land and order that a differently-constituted tribunal hear the cases together.

Submissions for the Respondents

19. For Mr Antas, Mr Boar submits that s. 39 (3) of the Customary Land Tribunal Act empowers the Supreme Court to make any orders it considers necessary in determining an application before it. He also refers to the unlimited jurisdiction given to the Supreme Court under Article 49 (1) of the Constitution and s. 28 (1) of the Judicial Services and Courts Act. He submits that to characterise Justice Saksak's decision as taking away the rights of appeal of Mr Sua is misconceived. He points out that the Supreme Court judgment did not cancel the Tribunal's decision in total but only the portion which purported to extend the boundary of the Naone Vuso land to cover Jingonaru land. He submits that if Mr Sua has any issue in relation to the existence of the Jingonaru land then he can file appropriate proceedings under s. 39 (1) of the Customary Land Tribunal Act.

20. On the question whether the Village Land Tribunal followed the appropriate process in making the Jingonaru decision, Mr Boar submits that that decision can only be set aside by an application under s. 39 , which Mr Sua has not done. Not surprisingly, he entirely supports the Supreme Court judgment which found in his client's favour.

21. The Solicitor-General Mrs Trief , in her written submissions, submits on behalf of the second and third respondents that the Supreme Court was correct in both aspects of its decision. She submits that the second respondent's decision dated 3 December 2009, in so far as it extended the appellant's land boundaries of Naone Vuso land to include the first respondent's Jingonaru land boundaries, failed to comply with the procedural requirements of the Act in that it purported to be a rehearing of the dispute in relation to custom ownership of Jingonaru land which had already been determined by the 2008 decision which had not been appealed. Accordingly she submits that the partial quashing by the Supreme Court of the 2009 decision was the correct decision.

22. As to the third respondent's decision, Mrs Trief submits that it had no power to hear any dispute in relation to Jingonaru land unless it was by way of appeal but there was no such appeal. Again therefore, she submits that the Supreme Court was correct in applying its power under s. 39.

Discussion and Decision

23. The first question to be determined is what was the statutory basis on which the Supreme Court made the decisions it did? In our view, although the application for

judicial review was not in terms expressed to be an application to the Supreme Court under s. 39 (2) of the Customary Land Tribunal Act, that is in reality what it was.

24. Mr Antas was complaining that both land tribunals (in 2009 and 2010 respectively) had failed to follow the procedures under the Act in the sense that, despite the warning in the Lands Department letter of 18 August 2009, they purported to deal with a dispute that had already been determined and not appealed. In short, the procedures under the Act do not allow redetermination of a dispute which has been determined by a Village Land Tribunal and not appealed, and the second respondent failed to follow them by purporting to do exactly that.

25. While the usual order on a successful application under s. 39 (2) would involve cancellation of the Joint Area Land Tribunal decision and an order that the dispute be re-determined by a differently-constituted land tribunal (as indeed Mr Tari emphasised) any order beyond cancellation would have made no sense in this situation. That is because the failure of the tribunal was to purport to redetermine an already-determined decision. It would make no sense to order it to remedy that failure by committing the same failure. Once the order was made cancelling the Tribunal's decisions (s39(2)(a)) there was no "dispute" to refer for determination (s 39(2)(b)).

26. To put this in another way, this was not the typical case of a challenge to an aspect of the procedure adopted by a Joint Area Land Tribunal but rather a fundamental challenge to its ability to consider the matter at all.

27. If further authority for the Court's decision is needed then, as Mr Boar pointed out, s. 39 (3) of the Act permits the Supreme Court in determining an application to *"make such other orders as it considers necessary"*.

28. As noted earlier, Mr Sua took virtually no part in the Supreme Court proceedings and he provided nothing by way of an answer to the case mounted by Mr Antas. The Attorney-General supported the submission which Mr Antas made that the second and third respondents had had no jurisdiction to do what they had done in 2009 and 2010 respectively. We agree with the submission on this point.

29. We are entirely satisfied that Justice Saksak's decision was right. We reject Mr Tari's submission that if the Court were to cancel the 2009 and 2010 decisions then it had to cancel decisions at all levels. On the contrary, the Court had good reason to cancel the decisions of the second and third respondents but no reason or basis to cancel that of the Joint Village Lands Tribunal or the unappealed 2008 decision of the second respondent. It is not correct that the Supreme Court took away any rights of appeal from Mr Sua. If

he was aggrieved by the decision of 9 September 2008 he had the right to appeal but did not do so.

30. We have already explained why Mr Tari's alternative submission set out at paragraph 14 above, is not accepted.

31. As to the balance of Mr Tari's submissions, we have also noted that there was no supporting evidence before the Supreme Court nor is there any before this Court which would justify consideration of those submissions.

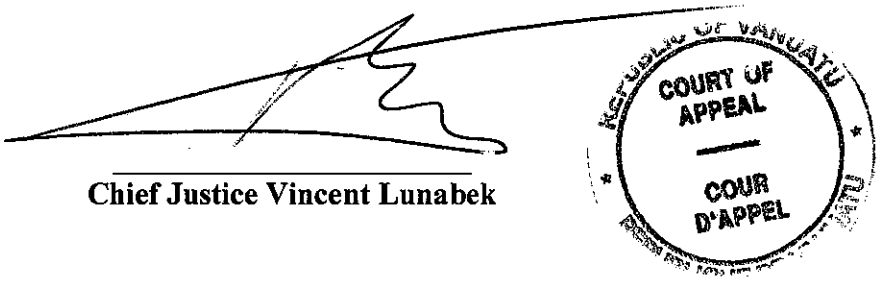
32. Justice Saksak made three orders at the conclusion of his judgment, the first two quashed the 2009 and 2010 decisions challenged by Mr Antas and the third confirmed by declaration that the 2008 decision was upheld by the Court as final.

33. The declaration made by the Supreme Court upholding the 9 September 2008 decision of the Second Respondent was arguably beyond its power under s.39(3) because this was not "necessary"; the effect of quashing the two later decisions was indeed to uphold the 2008 one. However, we decline to uphold the appeal to that extent since the declaration merely confirmed the correct position for the assistance of the parties and those otherwise interested in the case.

34. The appeal is dismissed with standard appeal costs to the respondents, to be taxed if not agreed.

Dated at Port Vila this 4th day of April, 2014

BY THE COURT



Chief Justice Vincent Lunabek